United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1902.

No. 1169. 131

MARTHA I. HUNT, APPELLANT,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 17, 1902.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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No. 1169.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 5, 1902.

In the Court of Appeals of the District of Columbia.

MARTHA I. HUNT, Appellant,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, a Corporation. } No. 1169.

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a Supreme Court of the District of Columbia.

MARTHA I. HUNT
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY. } No. 44753. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed June 18, 1901.

In the Supreme Court of the District of Columbia.

MARTHA I. HUNT, Plaintiff,
vs.
THE SPRINGFIELD FIRE AND MARINE INS. COMPANY (a Corporation), Defendant. } At Law. No. 44753.

The plaintiff, Martha I. Hunt, sues the defendant, The Springfield Fire and Marine Insurance Company, a corporation incorporated under the laws of the State of Massachusetts and engaged in doing business within the District of Columbia, for that:

First. Whereas heretofore, to wit, on or about the 2nd day of February, 1901, at the city of Washington, in the District of Columbia, by a certain policy of insurance then and there made, for and in consideration of the stipulations therein recited and the payment by the plaintiff to the defendant of the sum of fifteen dollars as a premium, the defendant did insure the plaintiff for the term of one year from on or about the 2nd day of February, 1901, against all direct loss or damage by fire, provided that such loss was not caused,

directly or indirectly, by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after the fire, or by explosion of any kind, to an amount not exceeding the sum of five thousand dollars ($5,000.00), on the
2 following-described property named in said policy of insurance, to wit, household furniture, useful and ornamental beds, bedding, linen, carpets, printed books, mirrors, musical instruments, music, sewing machines, family wearing apparel, fuel, family stores, trunks, valises, umbrellas, bicycles, plate and plated ware, pictures and their frames, statuary, and ornaments contained in the two-story metal-roofed brick dwelling situate at No. 1636 Sixteenth street N. W., in the city of Washington, District of Columbia, and by the terms of the policy the defendant agreed to pay the plaintiff the amount of any such loss, not exceeding the amount of the said insurance, at the expiration of sixty days after the defendant had been furnished by the plaintiff with proofs of such loss; and the plaintiff says that at the time of the making of the said policy of insurance, and from thence until the loss and damage hereinafter mentioned, — was possessed as sole owner of the said insured property in the said policy mentioned and thereby intended to be insured; and the plaintiff says that the premium in said policy mentioned was at the time of the making thereof duly paid by her to the defendant; and the plaintiff further says that after the making of the said policy and whilst the same was and remained in full force, to wit, on or about the February 16th and February 17th, 1901, the said insured property was burned, damaged, consumed, and destroyed by fire, whereby the plaintiff sustained loss and damage, to wit, five thousand dollars; and the plaintiff further says that although she has in all things conformed herself to and performed and observed all and singular the stipulations in said policy mentioned and on her part to be performed and observed according to the true intent and meaning thereof, and although the proofs of the said loss in due form and in ac-
3 cordance with the stipulations in the said policy of insurance contained were furnished by the plaintiff to the defendant on the 2nd day of April, 1901, and the plaintiff then offered to furnish the defendant with such further proof of the said loss as it might be entitled to request of her, yet the plaintiff says that, although upwards of sixty days have elapsed since the said 2nd of April, 1901, the defendant has refused to pay her the said loss or any part thereof, and the defendant and its agents have refused to replace or repair the said insured property which was burned, damaged, and destroyed, as aforesaid, with property of like kind and quality, or with any property whatsoever, such refusal on the part of the defendant being contrary to the true intent and meaning of the said policy of insurance and of the agreement of the defendant in that behalf made and set forth as aforesaid; and the plaintiff says the defendant, although often requested so to

do, has refused to perform its said agreement and has broken the same, and to perform the same does still refuse, and the plaintiff claims the sum of five thousand and twelve $\frac{50}{100}$ dollars ($5,012.50), being the total amount of the policy, and $12.50 interest on same from June 2nd, 1901, to June 17th, 1901, together with interest thereon from June 17th, 1901, besides the costs.

Second. For money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant and for work done and materials provided by the plaintiff for the defendant at its request, and for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at its request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant
4 to the plaintiff on accounts stated between them, and the plaintiff claims the sum of five thousand and twelve $\frac{50}{100}$ — ($5,012.*50*), with interests besides costs.

JOHN C. GITTINGS,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

JOHN C. GITTINGS,
Attorney for Plaintiff.

Defendant's Pleas.

Filed July 9, 1901.

In the Supreme Court of the District of Columbia.

MARTHA I. HUNT, Plaintiff,
vs.
THE SPRINGFIELD FIRE AND MARINE INS. Company (a Corporation), Defendants. } At Law. No. 44753.

* * * * * * *

4. For a further plea to the first count of the plaintiff's declaration the defendant says that in and by said policy of insurance
4½ it was provided that it should be void if the interest of the insured in the property insured at the time of the insurance was other than unconditional and sole ownership; and the defendant says that at the time of said insurance the plaintiff was not the unconditional and sole owner of the property insured, in this, that prior to said insurance the plaintiff had conveyed said property or a part thereof

(*a*) to A. H. Williams and C. H. Willard, by deed dated September 4, 1900, which was recorded September 25, 1900, in Liber 2526, folio 20, of the land records of the District of Columbia, said deed being a deed in trust to secure the payment to C. Webster of the sum of one hundred and eleven dollars and seventy cents ($111.70),

with interest, the property covered by said deed of trust being more particularly described in said deed of trust and a schedule thereto attached;

and (*b*) to A. H. Williams and C. H. Willard, by deed dated October 4, 1900, and recorded November 7, 1900, in Liber 2487, folio 438, of the land records of the District of Columbia, said deed being a deed in trust to secure payment to C. Webster of the sum of one hundred and seventeen dollars and fifty-five cents ($117.55), with interest, the property covered by said deed of trust being more particularly described in said deed of trust and schedule thereto attached;

and (*c*) to C. H. Albaugh and J. W. Wilson, by deed dated November 26, 1900, which was recorded on the same day in
5 Liber 2529, folio 157, of the land records of the District of Columbia, said deed being a deed in trust to secure the payment to D. R. McNaught of the sum of three hundred and seventeen dollars and fifty-two cents ($317.52), with interest, the property covered by said deed of trust being more particularly described in a paper annexed to said deed as recorded and marked Schedule "A."

5. And for a further plea to the first count of the plaintiff's declaration the defendant says that in and by said policy of insurance it was provided that if the subject-matter of the insurance should be personal property the said policy should be void if said property should be or become encumbered by a chattel mortgage, and, in fact, the subject of insurance in said policy was wholly per-
5½ sonal property, and that the same was encumbered by certain chattel mortgages, as more specifically set forth in the above plea numbered four.

6. And for a further plea to the first count of the plaintiff's declaration the defendant says that in and by said policy of insurance it was provided that if the subject of the insurance should be personal property the said policy should be void if said property should be or become encumbered by chattel mortgage, and that in fact the subject of insurance in said policy was wholly personal property, and that after the execution of the said policy, to wit, on February 7, 1901, the said plaintiff executed a chattel mortgage, whereby she encumbered the personal property or part thereof covered by said policy of insurance, and conveyed the same by deed dated February 7, 1901, which was recorded on the same day in Liber 2533, folio 322, of the land records of the District of Columbia, said deed being in trust to secure the payment to D. R. McNaught of the sum of four hundred and twenty dollars ($420.00), with interest, the property covered by said deed of trust being more particularly described in a paper annexed to said deed as recorded and marked Schedule "A."

* * * * * * *

A. B. DUVALL,
Attorney for Defendant.

6 *Demurrer to 5th and 6th Pleas.*

Filed July 26, 1901.

In the Supreme Court of the District of Columbia.

MARTHA I. HUNT, Plaintiff,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE Company (a Corporation), Defendant. } At Law. # 44753.

Now comes the plaintiff and demurs to the defendant's fifth (5th) and sixth (6th) pleas, and states that the same are bad in substance.

JOHN C. GITTINGS,
JOHN R. SHIELDS,
Attorneys for Plaintiff.

One of the matters of law intended to be argued is that the matter alleged in the fifth plea is no defense, unless the defendant suffered some detriment thereby.

One of the matters of law intended to be argued is that the terms "chattel mortgage" and "chattel trust," as set forth in the sixth plea, are not interchangeable.

7 Supreme Court of the District of Columbia.

FRIDAY, *November* 15*th*, 1901.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

MARTHA I. HUNT, Plaintiff,
vs.
THE SPRINGFIELD FIRE AND MARINE Insurance Company (a Corporation), Defendant. } No. 44753. At Law.

Come now the parties herein, by their respective attorneys, and the plaintiff's motion herein filed to strike out defendant's 2nd and 4th pleas coming on to be heard, it is, upon consideration thereof, ordered that said motion be, and it is hereby, granted, with leave, however, to defendant to plead over, as *he* may be advised, within ten days hereof; and, further, the plaintiff's demurrer to the defendant's 5th and 6th pleas coming on for hearing, it is, upon consideration thereof, ordered that said demurrer be, and it is hereby, overruled; to which the said plaintiff, by her attorney, in open court, notes an exception.

Supreme Court of the District of Columbia.

WEDNESDAY, *December* 18, 1901.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

MARTHA I. HUNT, Plaintiff,
vs.
THE SPRINGFIELD FIRE AND MARINE INS. Company (a Corporation), Defendant. } No. 44753. At Law.

8 It appearing to the court that an order was passed herein November 15th, 1901, overruling plaintiff's demurrer to defendant's fifth and sixth pleas, and the plaintiff now in open court electing to stand upon said demurrer, judgment is ordered; therefore it is considered that the said plaintiff herein take nothing by this suit; that said defendant go thereof without day and recover against said plaintiff its costs of defense, to be taxed by the clerk, and have execution thereof. From the aforegoing the plaintiff, by her counsel, in open court, notes an appeal to the Court of Appeals and prays that bond for costs on said appeal be fixed; whereupon the court orders that such a bond in the sum of one hundred ($100.00) dollars, with surety to be approved by the court, be filed herein, or that in lieu of such appeal bond she is hereby granted leave to deposit fifty ($50.00) dollars in the registry of this court.

Memorandum.

1901, December 19.—Bond on appeal filed.

9 *Order for Record on Appeal.*

Filed December 20, 1901.

In the Supreme Court of the District of Columbia, the 20th Day of December, 1901.

MARTHA I. HUNT
vs.
THE SPRINGFIELD FIRE AND MARINE INSURance Company (a Corporation). } At Law. No. 44753.

The clerk of said court will make record for the Court of Appeals, including only the following pleadings, to wit:

Declaration.

Defendant's 5th and 6th pleas.

Plaintiff's demurrer thereto.

Order overruling demurrer, and the judgment of the court thereon.

JOHN C. GITTINGS,
Attorney for Plaintiff.

O K.
A. B. DUVALL.

10 UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 9, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 44753, at law, wherein Martha I. Hunt is plaintiff and The Springfield Fire and Marine Insurance Company is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13th day of January, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1169. Martha I. Hunt, appellant, *vs.* The Springfield Fire and Marine Insurance Company, a corporation. Court of Appeals, District of Columbia. Filed Jan. 17, 1902. Robert Willett, clerk.

IN THE

Court of Appeals, District of Columbia.

JANUARY TERM, 1902.

No. 1169.

MARTHA I. HUNT, APPELLANT,

VS.

THE SPRINGFIELD FIRE AND MARINE INSURANCE CO. (A Corporation), APPELLEE.

Brief in Behalf of Appellant.

JOHN C. GITTINGS,
JNO. R. SHIELDS,
ULYSSES BUTLER,
Attorneys for Appellant.

Saxton Printing Co., Washington.

IN THE

Court of Appeals, District of Columbia.

JANUARY TERM, 1902.

MARTHA I. HUNT,
Appellant,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE CO. (A Corporation),
Appellee.

No. 1169.

STATEMENT OF CASE.

The appellee, the plaintiff below, brought suit upon a standard policy of insurance issued by the defendant company to the plaintiff, insuring certain furniture and other personal property, contained in her residenge, 1636 16th street N. W., Washington, D. C.; the amount of the policy being five thousand ($5,000.00) dollars.

The declaration alleges that, along about the 16th and

the 17th days of February, 1901, a fire occurred at said dwelling and said furniture and other personal property was damaged to the extent of five thousand ($5,000.00) dollars; that she in every respect complied with the terms of the said policy of insurance, and that the defendant, although repeatedly requested to perform its agreement to pay the damages sustained by the appellant, it has failed so to do.

To this declaration the defendant filed seven (7) pleas, whereupon the plaintiff joined issue upon the first, third and seventh pleas, moved to strike out the second and fourth, and demurred to the fifth and sixth. Subsequently the court sustained plaintiff's motion to strike out the second and fourth pleas.

The defendant's fifth plea is based upon the condition set forth in the printed form in the policy of insurance, which condition, as set forth in said plea, is to the following effect: "That in said policy of insurance it was provided that if the subject matter of the insurance should be personal property, that said policy should be void if said property should be or become incumbered by a chattel mortgage, and that, in fact, the subject of insurance in said policy was wholly personal property, and same was incumbered by a chattle mortgage, as more specifically set forth in the above plea number four." By looking at plea number four it will be seen that the instruments set forth therein are not chattel mortgages but are deeds in trust.

Plea number six, in form and substance, is identical with the fifth plea, with the exception that it refers to other instruments as being "chattel mortgages," whereas the said plea, on its face shows said instruments referred to are deeds in trust.

Plaintiff's demurrer to the fifth and sixth pleas raised the question of law, as to whether or not the term "chattel mortgage" as used in the policy of insurance covered deeds in trust given to secure a debt, or any other instruments

which are in the nature of a mortgage. The court over-ruled plaintiffs demurrer, to the over-ruling of which the plaintiff then and there noted an exception, which exception was duly allowed. The plaintiff elected to stand upon her demurrer, whereupon judgment was entered for the defendant, from which judgment this appeal was taken.

ASSIGNMENT OF ERROR.

The court erred in over ruling the plaintiff's demurrer to the fifth and sixth pleas.

ARGUMENT.

There seems to be no question, but, that the condition in a policy of insurance to the effect, that if there be, or there afterwards become placed upon the property insured, a chattel mortgage, that said policy shall become void, is in the eyes of the law a forfeiture; and we need not dwell on the elementary principle, that where a party's right is to be defeated by the operation of a forfeiture, that the language creating the condition, which operates as a forfeiture, should always be interpreted technically and strictly; and if the same is ambiguous, that all ambiguities shall be construed in favor of the insured and against the insurer. This principle is laid down by the Supreme Court of the United States in the case of Thompson *vs.* Phoenix Insuranee Co., 136 U. S., 297. Where the court used the following language:

"If the policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one because those instruments are drawn by the company."

This brings us to the sole question before this court for determination, that is, whether under a strict and technical

interpretation there is not a clear distinction, in the eyes of the law, between a "chattel mortgage" and a "deed in trust."

A chattel mortgage "is a conditional sale of chattels and operates to transfer the legal title to the mortgagee to be defeated only by a full performance of the conditions. Upon breach of the conditions the mortgagee may take possession of the property, and so far as the legal rights of the parties are concerned, he may thenceforth treat it as his own." (Jones on Chattel Mortgages, Sec. one.) And again,

"A mortgage is something more than a mere security; it is a conditional sale of chattels, and operates to transfer the legal title to the mortgagee, to be defeated upon a full performance of the conditions. Upon breach of the conditions the mortgagee may take possession of the property, and, so far as the legal rights of the parties are concerned, he may thenceforth treat it as his own; he may sell it; may squander or destroy it."

We might set forth innumerable definitions of a chattel mortgage, but it would be impossible to find one that would embrace a deed in trust, and it is respectfully submitted *that the term must stand or fall* upon the definition.

A creditor secured by a chattel mortgage, or properly speaking, the mortgagee, has the legal title and the right of possession, unless there be some condition in the mortgage by which the mortgagor or the debtor remains in possession until default. While the creditor or *cestui que trust* secured by a deed in trust would never be entitled, under any circumstances, to the possession of the chattels conveyed by the instrument to the trustees.

It is true that courts of equity construe a mortgage as a mere security for an indebtedness, but this is not the light in which it is viewed in courts of common law; upon execution of the mortgage the legal estate immediately becomes

legally vested in the mortgagee and the right of possession consequently follows, and unless the mortgagee should enter into an agreement whereby the mortgagor should retain possession until default and the mortgagee should afterwards, and before default, take the property away from the mortgagor, the mortgagor cannot maintain an action of trespass for such asportation.

Jamieson *vs.* Bruce, 6 Gill-Johnson, 72.
Pingrey on Mortgages, Vol. 1, Sec. 76–7–8.

These are only some of the distinctions between the effect of a chattle mortgage and a deed in trust. We might go on and show other distinctions *ad infinitum*, but that seems unnecessary for the purposes of this case.

It will no doubt be contended on the part of the defendant, that these are all minor differences, and that a deed in trust in the nature of a mortgage and a "chattel mortgage" are in substance the same; and that the term in the policy, to wit: "chattel mortgage" is broad enough to cover deeds in trust, which are in the nature of mortgages. This, appellant contends, cannot be true, as it is directly opposed to the policy of the law to construe forfeitures liberally in favor of those in whose favor they operate. That there are *clear distinctions* between mortgages and deeds in the nature of mortgages is so well recognized that some of the States have seen fit to legislate upon the question. Colorado, in 1883, passed an Act with the following provision, to wit:

"The provisions of this Act shall be deemed to extend to all such bills of sales, trust deeds and other conveyances of personal property, as shall have the effect of a mortgage, or lien upon such property."

Roberts *vs.* Johnson, 5 Col. App., 406–10.

The term chattel mortgage and chattel trust is not interchangable, as the differences appellant has above called to

the attention of the court are set forth in every text book where mortgages are treated of, and if it was the intention or purpose of the defendant company, in using the term "chattel mortgage," to embrace all instruments which are in the nature of a mortgage, it would have been very easy for it to have used such language as would cover incumbencies of all kinds, and not have used language to which doubt could attach.

Washington Fire Ins. Co. *et al. vs.* Kelly, 32 Md., 421.
Beck and Bolt *vs.* Insurance Co., 43 Md., 359.
Walput *vs.* Assurance Co., 44 W. Va., 734.
Morrotock Ins. Co. *vs.* Redefer, 92 Va. 747.

It may be contended that this court has passed upon this very question in the case of Dumas *vs.* Northwestern Ins. Co., 12 App. D. C., 245; but it is respectfully submitted that this question, to wit, the construction to be placed upon the term "chattel mortgage," as used in the policy of insurance, was not raised, and was not considered by this court in said case.

In the case of Middleton *vs.* Park, 3 App. D. C., 149, among other things, it was contended by the appellant that where a court of equity has authorized a guardian to mortgage certain real estate, that it was not a proper exercise of that authority for the guardian to execute a deed of trust, this court, in disposing of the question, held, that the borrowing of money upon the property and executing a deed of trust was equivalent to executing a mortgage. This, appellant contends, has nothing to do with the question in this case, as in that case a collateral attack was made on a deed which had been executed under express power granted by a court of equity and the court necessarily placed such a construction upon the instrument as was in conformity with equity and good conscience, whereas, in the case at bar, we

are dealing with the term "chattel mortgage," which is a condition that may operate as a forfeiture, and to which term there is a well defined legal meaning, and should, therefore, be restricted to the legal definition.

Appellant respectfully submits that the court below erred in overruling appellant's demurrer to the fifth and sixth pleas, and that judgment entered thereon should be reversed.

JOHN C. GITTINGS,
JNO. R. SHIELDS,
ULYSSES BUTLER,
Attorneys for Appellant.

IN THE

Court of Appeals of the District of Columbia

JANUARY TERM, 1902.

No. 1169.

MARTHA I. HUNT, APPELLANT,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, A CORPORATION, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

ANDREW B. DUVALL,

Attorney for Appellee.

IN THE

Court of Appeals of the District of Columbia

JANUARY TERM, 1902.

No. 1169.

MARTHA I. HUNT, APPELLANT,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, A CORPORATION, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

This is an appeal from a judgment of the Supreme Court of the District of Columbia overruling the plaintiff's demurrer to certain pleas filed by the defendant company in an action upon a certain policy of insurance issued by the defendant to the plaintiff insuring against loss or damage by fire certain furniture and other personal property in her residence, number 1636 Sixteenth street, N. W., in the city of Washington, D. C.

The declaration (Rec., p. 1), alleged that on February 2, 1901, the defendant company issued to the plaintiff a certain policy of insurance in consideration of the stipulations therein recited and the payment by her of the sum of fifteen dollars as a premium, whereby it insured the plaintiff for the term of one year against loss or damage by fire to an amount not exceeding $5,000; that at the time of issuing said policy and until it was damaged by fire the plaintiff was possessed, as sole owner, of said insured property; that on or about

February 16 and February 17, 1901, the said insured property was destroyed by fire whereby the plaintiff sustained loss and damage to the extent of $5,000; that the plaintiff had performed and observed all of the stipulations and conditions of the policy and had made proofs of the loss in accordance therewith, but the defendant had refused to pay the loss or any part thereof.

To this declaration the defendant filed seven pleas. The plaintiff demurred to the fifth and sixth pleas, and moved to strike out the second and fourth pleas. The latter motion was granted; but the demurrer to the fifth and sixth pleas was overruled (Rec., p. 5). The plaintiff elected to stand upon the demurrer, whereupon judgment was entered in favor of the defendant and against the plaintiff, from which judgment the present appeal to the Court of Appeals was taken (Rec., p. 6.)

The pleas sustained by the court are set out (Rec., p. 4). The fifth plea was that:

> "By said policy of insurance it was provided that if the subject-matter of the insurance should be personal property the said policy should be void if said property should be or become encumbered by a chattel mortgage, and, in fact, the subject of insurance in said policy was wholly personal property, and that the same was encumbered by certain chattel mortgages, as more specifically set forth in plea numbered four."

As set out in said plea numbered four it was alleged (Rec., p. 3) that the plaintiff had conveyed said property or a part thereof by four certain deeds in trust therein described to secure the payment of certain specified sums of money in the fall of the year 1900, a few months before procuring the policy of insurance from the defendant.

The sixth plea (Rec., p. 4) alleged that—

> "the subject of insurance in said policy was wholly personal property, and after the execution of said

policy, to wit, on February 7, 1901, the said plaintiff executed a chattel mortgage, whereby she encumbered the personal property or part thereof covered by said policy of insurance, and conveyed the same by deed dated February 7, 1901, which was recorded on the same day in Liber 2533, folio 322, of the land records of the District of Columbia, said deed being in trust to secure the payment to D. R. McNaught of the sum of four hundred and twenty dollars ($420) with interest, the property covered by said deed of trust being more particularly described in a paper annexed to said deed as recorded and marked Schedule 'A.'"

ARGUMENT FOR APPELLEE.

The Appeal Should Be Dismissed.

The appellant assigns as error the overruling of her demurrer to the fifth and sixth pleas.

This is an insufficient assignment of error under rule VIII, section 3, clause 2 of the rules of practice of this court. The rule requires the assignments of error "to be separately and specifically stated" and the brief should contain a specific assignment of errors.

Howgate *vs.* United States, 3 App. D. C. 277.

The appeal in this case should be dismissed for failure to assign errors in accordance with the rule of court.

Bradshaw *vs.* Scott, 4 App. D. C. 527.

There was a Breach of the Contract of Insurance by the Appellant, which Disentitled Her to Recover.

If, however, the court concludes to retain the appeal, it is argued in appellant's brief that the question for determin-

ation is whether there is a not a distinction in the condition in the policy of insurance between a "chattel mortgage" and "a deed in trust," the provision in the policy of insurance being that the "policy should be void if the said property should be or become encumbered by a chattel mortgage." That question, it is respectfully insisted, is not before the court on the record in this case, because the fifth plea alleges that the property "was encumbered by certain chattel mortgages," and the allegation of the sixth plea is that after the execution of the said policy the plaintiff executed a "chattel mortgage" on the property and conveyed the same—

> "by deed in trust to secure the payment to D. R. McNaught of the sum of four hundred and twenty dollars, with interest."

This is descriptive of a chattel mortgage pure and simple. Where is there anything anywhere in this record which would justify the court in holding that any of the encumbrances mentioned in said pleas were not chattel mortgages? The plaintiff by her demurrer admitted that they were such.

The contention of the plaintiff is that there are clear distinctions between a mortgage and a deed in the nature of a mortgage, and that the condition in the policy of insurance relates exclusively to a mortgage; that the creditor secured by a chattel mortgage has the legal title and right of possession, unless there be some condition in the mortgage by which the mortgagor or debtor remains in possession until default; while the creditor or *cestui que trust* would never be entitled, under any circumstances, to the possession of the chattels conveyed by the instrument to the trustees (Brief, p. 4). This is an entirely inadequate statement. Mortgages not unusually contain a provision for the mortgagor to remain in possession, and they very frequently contain a power of sale, and almost universally the mortgagor remains in possession.

Counsel for the appellant has exhibited no case in which any court has held that such a condition as the one in this

policy of insurance is not violated by a chattel deed of trust, or that there is any distinction under that condition between a chattel mortgage and a chattel deed of trust. The cases cited in appellant's brief do not support any such proposition.

In Morrotock Insurance Co. *vs.* Redefer, 92 Va. 747, the court held that the property insured was not personal property. The court conceded that the defense would have been good if personal property and not real property had been the subject of insurance. The other cases cited by appellant are to the effect that the existence of an encumbrance on property when it is insured is not inconsistent with the sole ownership of the property.

It is respectfully submitted that the question involved in this case has been ruled by this court adversely to the appellant's contentions in Dumas *vs.* Northwestern Insurance Co., 12 App. D. C. 245. That case was an action on a "standard" policy of insurance, the provisions of which were identical with the policy in suit; namely:

> "That it should be void if the insured had concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance, or if the interest of the insured in the property were not truly stated in the policy, or in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after loss. And that, unless otherwise provided by agreement endorsed upon the policy, it should be void if the insured should make any other contract of insurance on the property covered by the said insurance, or any part of it, or if the interest of the insured were other than unconditional and sole ownership, or if, the subject of the insurance being personalty, were or became encumbered by chattel mortgage, or if, with the knowledge of the insured, foreclosure proceedings were commenced, or notice of sale were made of any of the property by virtue of a mortgage or trust deed."

The insurance company claimed there, as here, that there was a breach by the appellant of the contract of insurance, because, among other things, the appellant was not the unconditional and sole owner of the property and because the property was encumbered "by a chattel mortgage or deed of trust," whereby—

> "the plaintiff had conveyed a part of said property to Henry F. Woodard by deed dated January 31, 1896, which was recorded on the 31st day of February, 1896, in Liber 2093, folio 152, of the land records of the District of Columbia, said deed being a deed in trust to secure the payment to the firm of Craig & Harding of the sum of $671.01," etc.

The Court in its opinion said (p. 255):

> Courts have sometimes been too astute in their search for reasons to maintain the liability of insurance companies in the face of conditions limiting such liability. And yet a contract of insurance in this regard is no different from other contracts; and the function of courts is to construe them, not to make them. In the absence of statutory provisions to the contrary, insurance companies have the same rights as individuals to limit their liability and to impose whatever conditions they please upon their obligations not inconsistent with public policy; and the courts have no right to add anything to their contracts or to take anything from them. If those contracts contain harsh and onerous conditions which perhaps a court of equity might not enforce, if called on so to do, yet there is no compulsion, either legal or moral, on parties to deal with them upon the basis of such conditions. And certainly it would be a novel contention for parties to seek to enforce liability under such contracts in a court of common law, and at the same time to repudiate the express conditions upon which such liability is made to depend.
>
> We must take it for granted, therefore, that our duty in the premises is to construe the contract of insurance before us according to its true legal intent and meaning, and not in any manner to vary or

> modify the instrument itself by disregard of any of its provisions . . . (257). It may be that it was in consequence of such decisions of the courts as those to which we have referred, wherein it was held that there was sole and unconditional ownership, in the legal sense of the policy of insurance, notwithstanding the existence of an outstanding mortgage, that insurance companies sought further to limit their liability by imposing conditions against such mortgages. But whatever may have been the suggestion for these conditions, it is very certain that they add limitations to the policy beyond that of sole and unconditional ownership, which we can not disregard. It was the right of the company in this case to refuse to insure mortgaged property, and to provide that its policy of insurance, however otherwise conditioned, should not cover personal property encumbered by a chattel mortgage. . . . The parties have deliberately put it into their contract and have made it an essential condition of that contract that the contract itself should not be binding, if there was any mortgage on the property or the title was not that of unconditional ownership. There was no inhibition by the law against the insertion of such a condition in the contract; and it may well be that its insertion was a matter of precaution, to guard as well against the negligence or failure of agents to elicit proper information, as against the negligence or failure, not fraudulent, of persons seeking insurance to give such information. The condition is not illegal and does not contravene any rule of public policy; and even if its practical effect should be held to be to throw upon the insured party the burden of giving voluntarily the information which otherwise the insurer would have been required to elicit by proper inquiry, we know of no rule of law that would preclude parties from contracting to that effect, if they so desire.

The court further held that the policy of insurance being a single, entire, and indivisible contract was invalidated by the forfeiture.

Said Mr. Justice Jackson, in Imperial Fire Ins. Co. *vs.* County of Coes, 151 U. S. 461:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured can not bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured can not recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made. It is settled as laid down by this court in Thompson *vs.* Phenix Ins. Co. of Brooklyn, 136 U. S. 287, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonable men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured.

> "But this rule is equally well settled that *contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.*"

Apply this rule of construction to the case at bar, and what becomes of the appellants' contention?

It is well settled that in the District of Columbia there is no recognized difference between deeds of trust and mortgages. In Middleton *vs.* Parke, 3 App. D. C. 149–164, Mr. Justice Morris, delivering the opinion of the court, said:

> "The deed of trust is the only form of mortgage that has been in general use in the District of Columbia for many years. The common law mortgage is practically unknown with us; *and everyone understands that, when a mortgage of real estate here is spoken of, the deed of trust is what is intended. . . . The deed of trust is here used as the equivalent of mortgage; and so the term is universally used by the community.* Indeed, while a mortgage is not necessarily perhaps a deed of trust, a deed of trust to secure the loan of money is necessarily a mortgage."

Mr. Justice Cooley, in considering a criminal statute, said:

> "The argument is that the word 'deed' has been used in the statute in the sense in which it is commonly used and employed, or at least that the rules of statutory construction applicable to criminal statutes would require us so to hold. We are not prepared to give our assent to this argument. The statute employs a general term which covers instruments given for a great variety of purposes, and it gives no indication of an intention to confine its operation to deeds of lands, much less to that class of deeds of land which convey the legal title."
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> People *vs.* Caton, 25 Mich. 393.

No reasonable rule of construction, however strict, would justify the appellant's contention that a chattel deed of trust was not within the condition of the policy of insurance in this case; it is both within the letter and the spirit of the condition; and it is respectfully submitted that there is no error in the record and the judgment below should be here affirmed.

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